a term not exceeding three years granted pursuant to s 223 of the Code, ie granted by the *proprietor* of any alienated land, by any *lessee* or *sub-lessee* for the time being and by any person holding under such tenancy or sub-tenancy.

We agree with the learned judge that the words 'all existing tenancies' must mean only tenancies protected by the Code. We adopt as the learned judge did what Dr David Wong said in his book *Tenure and Land Dealings in the Malay States* at p 415 when referring to s 213(3) of the Code that ' ... unless so protected, a tenancy exempt from registration, granted after the commencement of the present Code will be defeated not only by a subsequent registered dealing but also by a subsequent statutory lien and even a subsequent tenancy both the later being non-registrable'.

In conclusion, what is therefore the status of the appellants vis-a-vis the disputed property? According to the learned judge they are trespassers, or at most, bare licensees based on the facts stated earlier. Assuming they were licensees the service of the summons-in-chambers itself was a notice of termination of the licence. The case of *Canas Property* v *KL Television*[3] is authority for the proposition [at p 799] that the service of proceedings claiming possession makes the person on whom the proceedings are served trespassers. In the Court of Appeal (Lord Denning MR, Fenton Atkinson and Megaw LJJ) the question raised was, if a landlord brings an action for forfeiture when does the lease come to an end, when the writ is issued or when it is served? It was held that:

> A lessor does not effect a forfeiture merely by issuing a writ for possession against a lessee or assignee who is in breach of covenant. It is the service, not the issue of the writ which is equivalent to re-entry and effects a forfeiture; and the lease is determined from the date of service.

In fact prior to the issue of the summons-in-chambers in this case the appellants had notice when the respondents' former solicitors served them with the notice to quit dated 20 November 1989 requiring them to deliver vacant possession within 14 days from the date of receipt thereof which the learned judge held to be more than sufficient notice to a bare licensee. We agree.

In a much misunderstood judgment of this court in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors* v *Poh Swee Siang*[4] which had brought about contempt proceedings, the stand of our courts with regard to trespassers and the rights of persons entitled to possession is set out in the judgment at p 618 as follows:

> Our courts have consistently subscribed to the principle that one who has the right to enter upon another's land and act in excess of this right or after his right has expired is a trespasser — see *Sidek bin Hj Muhammad and Letchumi Ammal* v *Nam Fong Housing Sdn Bhd* [1982] 2 MLJ 19. Both these cases were decided by the former Federal Court and both appeals were heard about the same time by different quorums in early February and March 1982.
>
> Sections 7 and 8 of our Specific Relief Act 1950 should be read conjunctively. Section 8(1) of the Act clearly implies the remedy of self-help. Section 8(1) presupposes a person entitled to possession but is dispossessed contrary to his rights. It is understood that the landlord if he recovers possession otherwise than by the normal process of court action opens himself to the risk of being sued by the person dispossessed. That is the risk he must take.

Having gone through the careful judgment of the learned judge we detect no error in law or jurisdiction in his conclusions and orders. The appeal is accordingly dismissed with costs here and below.

Appeal dismissed.

Solicitors: *Annamalai & Co; VM Mohan.*

Reported by *Prof Ahmad Ibrahim*

Credit Corporation (M) Bhd v Fong Tak Sin

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-88-1990
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED YUSOFF AND AJAIB SINGH SCJJ
24 JANUARY 1991

Civil Procedure — Limitation — When cause of action accrues — Application to add party as defendant to suit — Whether application barred by limitation — Limitation Act 1953, s 6(1)(a)

The respondent, a taxi driver, was injured in an accident between his taxi and another motor vehicle on 18 June 1979. On 16 June 1984 the respondent took out a writ claiming special and general damages. Subsequently, on 15 August 1984 the solicitors for the respondents were informed that the appellant claimed to be the owners of the vehicle. The present solicitors for the respondents applied four years later to add the appellant as the third defendant in the suit. The issue before the learned judge was whether the respondent's application was barred by limitation. The learned trial judge held that time did not run against the respondent until the date he becomes aware that the appellant was the registered owner of the vehicle, that is, on 15 August 1984. He therefore allowed the application. The appellant appealed.

Held, allowing the appeal:

(1) It is established that the cause of action normally accrues where there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. In the present case the relevant date is 18 June 1979, when there existed the person in existence who can sue, that is the respondent, the person in existence who can be sued, the appellant, and the facts to be proved by the respondent to entitle him to succeed in the action.

(2) The provision of s 29(c) of the Limitation Act 1953, is applicable only where the mistake is an essential ingredient

of the cause of action. Knowledge on the part of the respondent in this case as to the identity of the appellant is irrelevant as such requirement is not provided for in the Limitation Act 1953.

(3) An application to add or substitute a new party to an action after the expiry of the limitation period should not be allowed and this is based on good and sound principles.

(4) The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly to have a definite end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[Bahasa Malaysia summary

Responden, pemandu teksi, telah cedera di dalam kemalangan jalanraya antara teksinya dan sebuah kereta lain pada 18 Jun 1979. Pada 16 Jun 1984 responden telah mengeluarkan writ menuntut gantirugi khas dan gantirugi am. Kemudiannya pada 15 Ogos 1984 peguamcara bagi pihak responden telah diberitahu bahawa perayu adalah pemunya kereta yang terlibat itu. Empat tahun kemudian, peguamcara baru responden telah memohon menambahkan perayu sebagai defendan ketiga di dalam guaman itu. Isu di hadapan hakim yang arif ialah sama ada permohonan responden itu dihalang oleh had masa. Hakim yang arif itu berpendapat bahawa masa tidak berjalan terhadap responden hingga tarikh dia mendapat tahu bahawa perayu adalah pemunya berdaftar kereta itu, iaitu pada 15 Ogos 1984. Oleh kerana itu beliau membenarkan permohonan itu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Adalah ternyata bahawa kausa tindakan biasanya wujud apabila terdapat ada orang yang boleh menuntut, ada orang lain yang boleh dituntut dan semua fakta telah terjadi yang perlu dibuktikan untuk membolehkan plaintif berjaya di dalam tindakannya. Di dalam kes ini tarikh yang berkenaaan ialah 18 Jun 1979, apabila telah ada orang yang boleh menuntut, iaitu responden, ada orang yang boleh dituntut, iaitu perayu, dan fakta yang perlu dibuktikan oleh responden untuk membolehkannya berjaya di dalam tindakan itu.

(2) Peruntukan s 2(c) Akta Had Masa 1953, hanya terpakai apabila terdapat kesilapan yang menjadi unsur yang penting bagi kausa tindakan itu. Kesedaran pada pihak responden di dalam kes ini mengenai identiti perayu adalah tidak relevan oleh kerana kehendak itu tidak diperuntukan di dalam Akta Had Masa 1953.

(2) Permohonan menambah atau mengganti pihak baru di dalam suatu guaman selepas tamatnya had masa tidak harus dibenarkan dan ini adalah berdasarkan prinsip-prinsip yang baik dan kukuh.

(4) Undang-undang mengenai had masa diadakan dengan tujuan utama tidak membiarkan plaintif-plaintif lelap di dalam tindakan mereka dan yang lebih penting supaya mendapatkan kesudahan muktamad kepada guaman. Asas yang logik undang-undang hak masa itu hendaklah difahami dan dikuatkuasakan oleh mahkmah.

Cases referred to

1 *Cook* v *Gill* (1873) LR 8 CP 107 (folld)
2 *Read* v *Brown* (1888) 22 QB 128 (folld)
3 *Lim Kean* v *Choo Koon* [1970] 1 MLJ 158 (folld)
4 *Phua Chin Chew & Ors* v *KM & Ors* [1987] 2 MLJ 604 (refd)
5 *Phillips-Higgins* v *Harper* [1954] 1 QB 411 (refd)
6 *RB Policies at Lloyd's* v *Butler* [1950] 1 KB 76 (refd)
7 *Ketteman* v *Hansel Properties* [1987] 2 WLR 312 (refd)
8 *Pirelli General Cable Works Ltd* v *Oscar Faber & Partners* [1983] 2 AC 1 (refd)

Legislation referred to

Limitation Act 1953 ss 6(1)(a), 29

Appeal from: Civil Suit No 876 of 1984 (High Court, Ipoh)

DP Naban for the appellant.
Sukhdev Singh for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): There was a motor accident along the 77th milestone Ipoh/Kuala Lumpur main road on 18 June 1979 between motor vehicle taxi No H5887 and another motor vehicle, a bus No JAB 980. The respondent was injured in the accident. On 16 June 1984 the respondent, as driver of the taxi, took out a writ claiming for special and general damages.

There was also another civil suit filed in Kuala Lumpur, Kuala Lumpur Civil Suit C38/82, in respect of the same accident. On 5 March 1984 the former solicitors for the respondent received a letter from the solicitors acting for the driver and owner of the said bus in the Kuala Lumpur civil suit who are now solicitors for the appellant.

In fact a number of letters were sent by the solicitors for the appellant to the former solicitors for the respondent but for the purpose of this judgment only one is really relevant. The letter appears at p 21 in the appeal record dated 15 August 1984 and reads as follows:

Skrine & Co
Advocates & Solicitors
Straits Trading Building
No 4 Leboh Pasar Besar
50050 Kuala Lumpur

TT/m/90713.T/84
GS/GAP/A/1648/80
15 August 1984

M/s Gurdial Singh & Co
29, 1st Floor
Station Road
Ipoh
Perak

Dear Sirs

Re: Kuala Lumpur High Court
Civil Suit No C38 of 1982

We refer to your letter dated 8 August 1984.

We have no instructions to act for the first defendant whom your client allege in the statement of claim is the owner of motor vehicle JAB 980. When we wrote to you on 3 August 1984 stating that we have instructions to accept service of process we had in mind the second defendant

and Credit Corporation (M) Bhd, who are the owners of the vehicle which was let out by them on hire purchase at the time of the accident.

We hope to serve you with the notice of appearance on behalf of the second defendant shortly.

Yours faithfully

cc client

It is clear in that letter that on 3 August 1984 the solicitors for the appellant had instructions to accept service of process in respect of the appellant being the owners of the vehicle let out on hire purchase at the time of the accident.

The respondent's previous solicitor passed away on 22 November 1988.

The present solicitors for the respondent filed a summons-in-chambers dated 20 February 1989 to apply for the following orders:

(a) leave to amend the writ of summons and statement of claim as set out in the draft amended writ of summons;
(b) liberty to add the appellant as third defendant in the civil suit; and
(c) the respondent be granted 30 days from the date of the order to file third party proceedings.

When the application went before the learned judge there was no dispute as to the primary facts. The learned judge found that the only issue before him was an issue of law whether the respondent's application was out of time, that is to say, barred by limitation.

Before the learned judge it was argued on behalf of the appellant that the six-year period of limitation had already lapsed as the accident occurred on 18 June 1979. The learned judge was of the opinion however as stated in his grounds of judgment that since the respondent became aware that the appellant was the registered owner of the vehicle on 15 August 1984, that is the date of the letter reproduced earlier, and not before that, time did not run from the date of the accident but only from the date that the respondent became aware of the 'involvement of the third defendant', ie on 15 August 1984.

Section 6(1)(a) of our Limitation Act 1953 (Revised 1981) provides, inter alia, that:

> *Save as hereinafter provided* actions founded on a contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. (Note emphasis.)

That provision invites the question as to what is the date on which the cause of action accrued. In *Cook* v *Gill* Brett J defined 'a cause of action' to mean 'every fact which is material to be proved to entitle the plaintiff to succeed'. This definition was subsequently approved by the Court of Appeal in *Read* v *Brown*.[2] After reviewing the authorities Yong J in *Lim Kean* v *Choo Koon*[3] came to the conclusion that the period of limitation does not begin to run 'until there is a complete cause of action'. In that case he held that the plaintiff's cause of action was not complete until an order is obtained from the Rent Assessment Board fixing the amount of the rent legally recoverable under the Control of Rent Ordinance. He accordingly held that the period of limitation commenced to run only from the date of the order of the Board.

From established authorities we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

The trial judge considered the background facts of this case and he made several findings. He found that the previous solicitors for the respondent had done a search with the RIMV for particulars but failed to find anything useful. The judge also found that after several letters to the RIMV the reply from the RIMV still stated that the first defendant was the registered owner. It was only from 3 August 1984 that a letter was received from the solicitors for the appellant which was referred to in the letter reproduced earlier in the judgment.

In our view the trial judge in the instant case fell into error firstly on the reference to the date on which the respondent became aware of the identity of the appellant assuming that knowledge is a relevant issue. According to the letter reproduced earlier in the judgment the respondent became aware not on the date of the letter but on the date earlier to that as referred to in the letter, that is 5 March 1984. Secondly the learned judge was in error as to the law of limitation to be applied in this case.

Section 11 of the 1980 English Limitation Act provides for special time limit for actions in respect of personal injuries. That section applies to any action of damages for negligence, nuisance and breach of duty. The relevant provisions of that section read as follows:

> (2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which the section applies.
> (3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.
> (4) Except where subsection (5) below applies the period applicable is three years from —
>
> (a) the date on which the cause of action accrued; or
> (b) the date of knowledge (if later) of the person injured.
>
> (5) If the person injured dies before the expiration of the period mentioned in subsection (4) above, the period

applicable as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 shall be three years from —

(a) the date of death; or
(b) the date of the personal representative's knowledge

whichever is the later.

We have no equivalent of s 11 of the English Limitation Act 1980 in our law. Section 24 of our Act is a provision safeguarding the position of persons under legal disability (see *Phua Chin Chew & Ors* v *KM & Ors*[4]). By virtue of s 29 of our Act in cases of fraud or mistake the period of limitation is postponed and does not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

A perusal of the appeal record here shows that there is a reference to s 29 in the submission of counsel for the respondent appearing in the notes of proceedings but this section is not however referred to in the grounds of judgment. The line of argument before the learned judge was probably that the respondent's mistake was caused by the negative response from the RIMV. But s 29 of the Limitation Act 1953 cannot apply to this case for the following reasons.

Section 29 of our Limitation Act 1953 is in pari materia with s 26 of the old English Limitation Act 1939 and the relevant part reads as follows:

29 Where, in the case of any action for which a period of limitation is prescribed by this Act, either —

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
(b) the right of action is concealed by the fraud of any such person as aforesaid; or
(c) the action is for belief from the consequences of a mistake.

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

This provision was inserted to protect a plaintiff who was ignorant of his right of action in the special case of fraudulent concealment, and to overcome the difficulty that time would otherwise be running against him, unknown to him. As a general rule as stated in the notes in 24 *Halsbury's Statutes of England and Wales* (4th Ed) to s 32 of the English Limitation Act 1980 (which is in pari materia with s 26 of the English Limitation Act 1939 which is in turn in pari materia with s 29 of our Limitation Act 1953) it is stated that s 29(1)(c) applied 'to an action at common law to recover money paid under a mistake of fact or to an analogous claim in equity for money paid under a mistake of act or law'.

The provision of s 29(c) of our Limitation Act 1953 is therefore only applicable where the mistake is an essential ingredient of the cause of action. This is explained by Pearson J in *Phillips-Higgins* v *Harper*[5] at p 418 when considering the corresponding section in the English law:

> What, then, is the meaning of provision (c)? The right of action is for relief from the consequences of a mistake. It seems to me that this wording is carefully chosen to indicate a class of actions where a mistake has been made which has had certain consequences and the plaintiff seeks to be relieved from those consequences. Familiar examples are, first, money paid in consequences of a mistake: in such a case the mistake is made, in consequence of the mistake the money is paid, and the action is to recover that money back. Secondly, there may be a contract entered into in consequence of a mistake, and the action is to obtain the rescission or, in some cases, the rectification of such a contract. Thirdly, there may be an account settled in consequence of mistakes; if the mistakes are sufficiently serious there can be a reopening of the account.

In *RB Policies at Lloyd's* v *Butler*[6] Streatfield J explained the rationale of s 26 of the English Act as follows:

> This section was inserted to protect a plaintiff who was ignorant of his right of action in the special case of fraudulent concealment, and to overcome the difficulty that time would otherwise have been running against him, unknown to himself. But for the section, time would have run against him from the accrual of his right of action, for it is to be noted that the section, even in the case of fraudulent concealment, does not say that the cause of action shall not accrue until the fraud is discovered, but simply that 'time shall not begin to run' until that event.
>
> *It is to be noted that s 26 is the only provision in the Limitation Act 1939, in which a special exception of that nature is made. Nowhere is it to be found that where a person, who otherwise has a perfect cause of action, cannot pursue it because the defendant is unknown, time does not run.* And it seems to me, therefore, that prima facie as soon as there is a cause of action (as there clearly was in the present case the moment the motor car was stolen) time begins to run notwithstanding the fact that the plaintiff is ignorant of the identity of the defendant. (Note emphasis.)

RB Policies at Lloyd's v *Butler*[6] dealt with an action for conversion. A car was stolen in 1940 and the identity of the thief was not known and the car was not traced until 1947. The plaintiffs (successors in title to the owner of the car) then brought an action against the defendant, an innocent purchaser for value of the car, for its recovery. The defendant relied on the Limitation Act 1939. Streatfield J began his judgment by asking the question 'When does a cause of action accrue?' He said at p 79:

> When the thief, whoever he was in the present case, stole the motor car in 1940 he clearly converted it to his own use, and apart from the question of prosecution for the felony, if he had then been known, an action could undoubtedly have been brought against him for conversion of the car. There being thus a cause of action, I have to

determine whether it is necessary that there should be an actual known and available defendant to such an action before it can be said that the cause of action has accrued within the meaning of s 2, sub-s I, and s 3, sub-s I, of the Limitation Act.

Various definitions have been made of an accrual of a cause of action, and I start with the proposition in 20 *Halsbury's Laws of England* (2nd Ed) p 618, which has been submitted by Mr Atkinson: 'A cause of action cannot 'accrue unless there be a person in existence capable' of suing and another person in existence who can be sued.' In the present case there was, of course, a person capable of suing, but was there another in existence who could be sued?

Is it to be said that because a person is, possibly only temporarily, untraceable, he is not in existence, or cannot be sued? Whoever the thief was, if he had been traceable, he could have been sued: so I doubt whether it can be said that there was no person in existence, for the purpose of that definition, who could have been sued.

Knowledge on the part of the respondent as to the identity of the appellant is irrelevant as such requirement is not provided for in our statute of limitation. This is the second error made by the learned judge.

An application to add or substitute a new party to an action after the expiry of the limitation period should not be allowed on good and sound principles.

Lord Keith of Kinkel in *Ketteman* v *Hansel Properties*[7] referred to an old rule of practice at p 320. His Lordship said:

It has long been a rule of practice that amendment should not be allowed for the joinder of an additional defendant in a situation where a relevant period of limitation has already expired in relation to the cause of action against him. The reason for that rule of practice is, however, debatable. One theory is that an additional defendant, joined unconditionally, becomes a party to the action as from the date of issue of the writ against the original defendant, that is to say, that joinder is related back to that date. That being so, it would be unjust to join him as a defendant at a time when limitation has run in his favour, because to do so would have the effect of depriving him of a valid defence.

In *Ketteman*[7] the original action was by some house owners against the builders for structural defects in their houses they had purchased from the builders. The action was commenced in the middle of 1980. Nearing the middle of 1981 the builders issued a third part notice to the District Council concerned claiming indemnity or contribution. The council denied the allegations and towards the latter part of 1981 issued a fourth party notice to the architects concerned claiming indemnity or contribution on the grounds of negligence in the design of the foundations of the houses. In the middle of 1982 the house owners issued a summons for leave to join the said District Council and the said architects as defendants to the action. The delays were the 'unfortunate viscissitudes' referred by Lord Keith of Kintel.

The action was based on contract and in tort. The House of Lords in *Pirelli General Cable Works Ltd* v *Oscar Faber & Partners*[8] held that the date of accrual of a cause of action in tort for damage caused by the negligent design or construction of a building was the date when the damage came into existence, and not the date when the damage was discovered or could with reasonable diligence have been discovered.

The house of Lords in *Ketteman*[7] examined the real reason for the old rule of practice in refusing amendment for the joinder of an additional defendant where the relevant period of limitation had already expired. The House of Lords looked at two different theories for that rule of practice. The first theory was called the 'relation back' theory in that the additional defendant becomes a party to the action as from the date of the issue of the writ against the original defendant. According to this theory it would be unjust to allow the joinder of the additional defendant at the time when the limitation had run in his favour because to do so would have the effect of depriving of his right of a valid defence.

The second theory is called the 'no useful purpose theory', because no useful purpose would be served by joining an additional defendant when the limitation had already run in his favour because he was not to be deemed to have become a party at an earlier date when the actual date of joinder and therefore would have an unanswerable defence to the plaintiff's claim.

Their Lordships in *Ketteman*[7] held the view that the true basis of the old rule of practice is the second theory, that is the 'no useful purpose' theory.

As stated earlier a cause of action is said to have accrued when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. In the present case on 18 June 1979 there was undoubtedly in existence someone who can sue, that is, the respondent. There was also undoubtedly some person in existence who can be sued, amongst them the appellant. On the same date there was also in existence the facts to be proved by the respondent to entitle the plaintiff to succeed in the action.

The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim *interest*

reipublicae ut sit finis litium that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

The appeal is accordingly allowed with costs here and below.

Appeal allowed.

Solicitors: *Skrine & Co; Sukhder Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Khoo Yoke Wah & Ors v Lee Choo Yam Holdings Sdn Bhd & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-93 OF 1990
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND GUNN CHIT TUAN SCJJ
17 JANUARY 1991

Partnership — Dissolution — Death of a partner — Whether agreement exists between existing partners that partnership would not be dissolved by death of one partner — Partnership Act 1961, s 35(1) — Contracts (Malay States) Ordinance 1950, s 206(j) — Contract Act 1872 [Ind], s 253(10) —Partnership Act 1890 [UK], s 33(1)

The respondents in this case had applied for a declaration that a partnership firm had been dissolved on the death of two of the partners and that a receiver be appointed for the purposes of a dissolution of the said firm. The learned trial judge declared that the partnership firm had been dissolved. [See [1990] 2 MLJ 431.] The appellants appealed.

Held, dismissing the appeal:

(1) By reason of the terms of 35 of the Partnership Act 1961, the death of a partner, in the absence of agreement between the partners, dissolves a partnership.

(2) The learned trial judge was correct in finding that there was no evidence either written or oral or to be referred from the evidence of the surviving partners and the heirs of the deceased partners to justify a conclusion that there was an agreement between the existing partners that the partnership should continue notwithstanding the death of a partner.

[Bahasa Malaysia summary

Responden-responden di dalam kes ini telah memohon mendapat deklarasi bahawa suatu firma perkongsian telah dibubarkan oleh kerana kematian dua pekongsinya seorang penerima dilantik untuk maksud pembubaran itu. Hakim yang arif telah membuat deklarasi bahawa firma perkongsian itu telah dibubarkan. [Sila lihat [1990] 2 MLJ 431.] Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Oleh kerana peruntukan s 35 Akta Perkongsian 1961, kematian seorang pekongsi, jika tidak ada persetujuan antara pekongsi-pekongsi itu, menamatkan perkongsian itu.

(2) Hakim yang arif telah betul memutuskan tidak ada keterangan, sama ada bertulis atau lisan atau yang boleh diambil kesimpulan dari kelakuan pekongsi-pekongsi yang masih ada dan waris pekongsi-pekongsi yang telah mati untuk membolehkan keputusan dibuat bahawa ada perjanjian antara pekongsi-pekongsi itu bahawa perkongsian itu akan terus wujud walaupun ada pekongsi yang telah mati.]

Cases referred to

1 *Lancaster* v *Allsup* (1887) 57 LT 53 (refd)
2 *Inland Revenue* v *Graham's Trustees* [1971] Scots Law Times 46 (refd)
3 *In re Adams & Anor* (1853) 2 Ky Bk 3 (folld)

Legislation referred to

Partnership Act 1961 s 35(1)

Appeal from: Originating Summons No D2-31-198-1988 (High Court, Kuala Lumpur)

G Sri Ram (*Joseph Yeo* with him) for the appellants.
CV Das (*Krishna Aiyer* with him) for the respondents.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): This appeal involves the construction of s 35 (1) of the Partnership Act 1961 ('our Act'), which is concerned with the dissolution of a partnership by death or bankruptcy and is as follows:

> Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

On 1 October 1988, Lee Choo Yam Holdings Sdn Bhd, Hew Hee @ Hew Tin Hee and Cheh Yah Chok ('the respondents') filed an originating summons for an order for a declaration that the partnership and business of Tai Kwong Goldsmiths & Jewellers stand dissolved under s 35(1) of the Partnership Act 1961, and that a receiver be appointed for the purposes of a dissolution of the said business. The originating summons was served on Khoo Yoke Wah, Lee Kim Seng, Lee Choo Keong, Lee Choo Leong, Lee Wah Hoong, Lee Bon Chai @ Lee Kim Hooi ('the appellants') and on one Eng Chek Song @ Eng Hup Choon, who did not oppose it.

The relevant facts found by Anuar J in the High Court were that the appellants, the respondents and the said Eng Chek Song as partners of Tai Kwong Goldsmiths & Jewellers were carrying on the business of goldsmiths and jewellers. One Lee Choo Meng, who was the most senior partner managing the business, died in August 1988 whilst another partner, Ngai Ngan Tong, died in April 1988.

When the partnership was formed on or about 15 September 1958, there were 18 partners. Since the formation of the partnership until the death of the said Lee Choo Meng in 1988, there were several changes in the constitution of the partnership firm. Some partners died while others joined as new partners or merely stepped into the shoes of a deceased partner. Nobody